

July 13, 2000

Rules Docket Clerk
Office of General Counsel, Room 10276
U.S. Department of Housing and Urban Development
451 Seventh Street, SW
Washington, DC 20410-0500

Subject: Inadequate Regulatory Flexibility Act certification of HUD's proposed Smoke Alarm Safety Standards Rulemaking for Manufactured Home Construction; Docket No. FR4552-P-01; 65 Fed. Reg. 31778 (May 18, 2000).

On May 18, 2000, the Department of Housing and Urban Development (HUD) published a Notice of Proposed Rulemaking (NPRM) on smoke alarm safety standards for manufactured home construction. HUD's proposal would amend the Federal Manufactured Home Construction and Safety Standards to revise the requirements for the location and placement of smoke alarms. HUD proposed this action to improve the effectiveness and performance of smoke alarms in early warning detection of manufactured home fires and to reduce the rate of fire fatalities in new manufactured housing.

The Office of the Chief Counsel for Advocacy of the U.S. Small Business Administration (SBA) was created in 1976 to represent the views and interests of small businesses in federal policy making activities.¹ The Chief Counsel participates in rulemakings when he deems it necessary to ensure proper representation of small business interests. In addition to these responsibilities the Chief Counsel monitors compliance with the Regulatory Flexibility Act (RFA), and works with federal agencies to ensure that their rulemakings analyze and substantiate the impact that their decisions will have on small businesses.

Regulatory Flexibility Act Requirements

As properly stated in HUD's "Impact on Small Entities" section of the proposal, the RFA requires administrative agencies to consider the effect of their actions on small entities, including small business, small non-profit enterprises, and small local governments. See 5 U.S.C. § 601, et. seq. If the proposed rule is expected to have a significant economic impact on a substantial number of small businesses, an initial regulatory flexibility analysis (IRFA) must be prepared and published with the proposed rule.

Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an IRFA, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities. If the head of the agency makes such a certification,

¹ Regulatory Flexibility Act, 5 U.S.C. § 601, as amended by the Small Business Regulatory Flexibility Act, Pub. L. No. 104-121, 110 Stat. 866 (1996).

the agency shall publish it in the Federal Register, along with a statement providing the factual basis for the certification. *Id.*

HUD's Certification Does Not Comply with the RFA

In the smoke alarm proposal, HUD certified that the rulemaking would not have a significant impact on a substantial number of small entities. Advocacy believes the explanation supporting this certification to be insufficient under the Regulatory Flexibility Act. However, the statement and explanation are a good start towards a proper certification under the RFA, as HUD has produced some analysis of the economic impact of the smoke alarm proposal on the home manufacturing industry. These comments provide assistance to HUD with the belief that only a modest amount of additional analysis, and subsequent publication of a request for comment on RFA issues, would be necessary to meet RFA requirements. These comments also summarize the certification errors and offer suggestions on how to address these RFA issues.

a) Cost Impact Analysis - General

In its certification, HUD stated that it has conducted a material and labor cost impact analysis. This was done by determining a per home cost of the rule - \$28.05. HUD further calculated the impact on the manufacturing industry by multiplying this cost by the number of homes produced in a year - 350,000 homes. The potential cost impact of this rule was therefore determined to be \$9.8 million annually. (\$28.05 x 350,000). As a result of this calculation, HUD concluded that \$9.8 million “does not represent a significant economic effect on either **an industry-wide or per unit basis**,”² believing this statement to be sufficient justification for its certification of no significant impact on a substantial number of small entities.

We will assume for this part of the discussion that the \$28.05 is an accurate assessment of the cost of the additional smoke alarms and labor necessary for an employer to spend as a result of this new rule. Even so, HUD neglected to determine the actual or estimated impact of this proposal on those **small entities** which manufacture homes. How many of the manufacturers which will be affected by this rule can be considered to be a small business under SBA size standards?³ Of the 350,000 homes produced each year, what percentage are made by those small businesses? Are smoke alarm costs standard or do small businesses have additional costs associated with their operation, by nature of their size, which would require them to have additional costs associated with complying with this rule?

In order to determine whether this rule would have a significant economic impact on a substantial number of **small** entities, HUD must determine the number of houses which are manufactured by those businesses and **then** multiply that figure by \$28.05. This would provide the overall impact on all of the small entities affected by the rule. Is the

² 65 Fed. Reg. 31778, at 31780.

³ 13 CFR 121.

average home production data by these entities available? Has HUD estimated what one small home manufacturer can expect to pay per year as a result of this rule? When assessing impact upon small businesses, it is usually helpful to make this determination by looking at the economic cost to the employer as a percentage of profits. HUD may not have all of the necessary data on small entities in this industry. However it can make some cost impact assumptions and ask the public for comment on those assumptions, and/or ask for the data that is needed to make those determinations.

By not providing the information on the number of entities affected, the impact of the anticipated costs of the rule on a business' profits, and an estimate of the beneficial impacts of the proposal, HUD failed to provide a factual basis for its certification and did not comply with the Regulatory Flexibility Act. The reason that a factual basis must be provided for comment is to assure that the agency has a basis for its regulation and that it will not adversely effect competition. Without this information, neither the Office of Advocacy, nor the public, can assist in that determination by commenting on HUD's assumptions and analysis. Providing industry-wide or per unit impact information, as in this case, does not satisfy the RFA, because it does not provide enough facts to which the public can react. Therefore, at a minimum, HUD should provide a factual basis in its Final Rule, with reasons supporting its certification.

Admittedly, the smoke alarm proposal is not one which is high on the list of costly and over burdensome government regulations. In all likelihood, the additional information and calculations needed for HUD to make a proper statement of certification under the RFA will not change the outcome of the certification itself. However, the Office of Advocacy would like to assist HUD in its compliance with the Regulatory Flexibility Act on this, and perhaps more costly, future regulations. The cumulative cost of ignoring small cost-ineffective regulations is increased vulnerability of small entities. Therefore, it is important for HUD to ensure that it has adequately performed a threshold analysis when certifying "no significant impact" within a proposed regulation.

b) Cost Impact Analysis – the \$28.05 estimate

Our economic regulatory staff was additionally concerned with the calculation of the \$28.05 cost estimate. While Advocacy is pleased that HUD published a list of the assumptions made in calculating this figure, as well as the inclusion of a chart detailing those calculations, we remain concerned about potential omitted costs which might increase the cost estimate for small entities.

The proposed regulatory package presents costs in terms of the price of a re-engineered smoke alarm. It appears the \$28.05 estimate was calculated without regard to size of the manufactured home or the manufacturer of the home. The cost of the new smoke alarm for small manufacturers may be higher per unit than for large manufacturers, due to scale economy considerations. HUD should consider this information to the extent feasible and include it in its cost analysis.

Another cost which does not appear to be considered in the calculation of the \$28.05 figure, is that which will result from the required changes in location of the smoke alarms in a manufactured home. As a result of the changes in placement of smoke alarms throughout the house, the manufactured housing may have to be redesigned in some manner to accommodate this requirement. HUD should consider inclusion of this potential increase in cost for small manufacturers in order to reflect accurately the economic impact of this regulation upon them.

Conclusion

The purpose of these requirements is not to overburden agencies. The Regulatory Flexibility Act is intended to provide flexibility to regulations, without compromising HUD's safety objectives, while minimizing the impact on small entities. HUD has clearly made an effort toward complying with those important requirements in its initial publication of the smoke alarm proposal. Advocacy staff has already had productive conversations with HUD's General Counsel's office to correct many of the changes suggested above and we look forward to working with HUD on this and future regulatory actions.

If your office would like to discuss this matter, or if this office can be of further assistance, please contact Claudia Rayford of my staff. She can be reached at (202) 205-6804. For additional assistance with any of the economic impact analysis calculations, feel free to contact Allen Bassala at (202) 205-6071.

Sincerely,

Jere W. Glover
Chief Counsel for Advocacy